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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-923

ALAN L. STEIN, Successor in Office to RICHARD T. SILBERMAN, as Secretary of the Business and Transportation Agency of the State of California,

Appellant,

vs.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, et al., and FEDERAL HOME LOAN BANK BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF NONGOVERNMENTAL APPELLEES TO DISMISS OR AFFIRM PURPORTED APPEAL

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CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, et al., and FEDERAL HOME LOAN BANK BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF NONGOVERNMENTAL APPELLEES TO DISMISS OR AFFIRM PURPORTED APPEAL

Appellees Conference of Federal Savings and Loan Associations, a California corporation, and Alameda Federal Savings and Loan Association, Bay View Federal Savings and Loan Association, California Federal Savings and Loan Association, Coast Federal Savings and Loan Association, Eureka Federal Savings and Loan Association, First Federal Savings and Loan Association of San Diego, First Federal Savings and Loan Association of Santa Monica, First Federal Savings and Loan Association of South Pasadena, Home Federal Savings

and Loan Association of San Diego, Orange Belt Federal Savings and Loan Association, Pacific Federal Savings and Loan Association, Peoples Federal Savings and Loan Association, Pomona First Federal Savings and Loan Association, Provident Federal Savings and Loan Association of Riverside, Redlands Federal Savings and Loan Association, Republic Federal Savings and Loan Association, San Francisco Federal Savings and Loan Association, Santa Fe Federal Savings and Loan Association, The Heart Federal Savings and Loan Association, and Western Federal Savings and Loan Association ("the federal associations") hereby move, pursuant to Rule 16 of the Rules of the United States Supreme Court, to dismiss the purported appeal of Appellant Alan L. Stein, successor in office to Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California ("the Secretary") from the judgment of the United States Court of Appeals for the Ninth Circuit ("the Court of Appeals") in *Conference of Federal Savings and Loan Associations, et al. v. Alan L. Stein, etc.*, No. 78-3201 ("said judgment") or, in the alternative, to affirm said judgment, on each and all of the following grounds:

1. Said judgment did not hold a state statute repugnant to the Constitution, treaties or laws of the United States within the meaning of 28 U.S.C. §1254(2); and

2. The purported appeal fails to present a question of law which is sufficiently substantial to warrant further argument.[1]

[1] At the commencement of the litigation from which the within purported appeal arises the office of the Secretary, which is presently held by Alan L. Stein, was held by a Richard T. Silberman. Since the individual identities of the persons holding the office of the Secretary are of no legal significance in the premises, both Silberman and Stein are each referred to simply as "the Secretary" without distinction between them.

I

ALLEGED BASIS OF JURISDICTION

The Secretary predicates United States Supreme Court jurisdiction over the instant purported appeal exclusively upon 28 U.S.C. §1254(2), which provides as follows:

> "Cases in the courts of appeal may be reviewed by the Supreme Court. . .
>
> * * *
>
> "By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal question presented."

II

STATEMENT OF THE QUESTION

The only question legitimately presented by the instant purported appeal is whether federal law precludes the Secretary from regulating federal associations in California by imposing upon them certain procedural requirements of California Health and Safety Code §35800 *et seq.* ("the state 'fair lending' law").[2]

[2] The statement of the Secretary to the contrary notwithstanding ("Jurisdictional Statement", pp. 1-2), the judgment of the United States Court of Appeals for the Ninth Circuit did *not* hold that the state "fair lending" law, "insofar as it applies to federally chartered savings and loan associations, is unconstitutional in that it violates Article VI, cl. 2 of the United States Constitution". As set forth in § IV A., *infra,* the Court of Appeals never reached the question of whether the state "fair lending" law was intended to apply to federal associations and, accordingly, did *not* determine—and, indeed, could not have determined—that the California "fair lending" law was even invalid, much less unconstitutional.

III

STATEMENT OF THE CASE

A. ***The Parties.***

The Appellant, the Secretary, is the Chief Executive Officer of the Business and Transportation Agency of the State of California, an agency which consists, *inter alia,* of the California Department of Savings and Loan, the California Department of Real Estate, and the California State Banking Department. (California Government Code §§13975 and 13976.) He "has the power of general supervision over, and is directly responsible to the Governor [of the State of California] for the operations of each department, office, and unit within the agency"; and he "may issue such orders as he deems appropriate to exercise any power or jurisdiction or to assume or discharge any responsibility, or to carry out or effect any of the purposes vested by law in any department in the agency". (California Government Code §13978.) Accordingly, he exercises supervisory and regulatory authority over the operations of savings and loan associations chartered under the laws of the State of California.

One of the Appellees in the within appeal is the Federal Home Loan Bank Board ("the Board"), an independent federal agency.[3] It is charged by federal law, the Home

[3] 12 U.S.C. §1437(a) provides, in pertinent part:

> ". . . there shall be a board, to be known as the 'Federal Home Loan Bank Board', which shall consist of five [under 62 Stat. 1283 and 75 Stat. 832 the number has been reduced to three] citizens of the United States appointed by the President of the United States, by and with the advise and consent of the Senate.
>
> * * *
>
> "The board shall supervise the Federal Home Loan Banks created by this chapter, shall perform the other duties specifically prescribed by this chapter, and shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this chapter."

Owners' Loan Act of 1933 ("HOLA") (12 U.S.C. §1464(a) *et seq.*), with the responsibility for the organization, incorporation, examination, operation and regulation of federal savings and loan associations:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations' . . . and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (12 U.S.C. §1464(a).)

The remaining Appellees are the federal associations, consisting of a trade association the membership of which includes approximately sixty federally chartered savings and loan associations which have their principal places of business in California, and twenty individual federally chartered savings and loan associations, each of which has its principal place of business in California.

B. ***The Pertinent Facts.***

The Board has for many years prohibited "redlining", as well as other forms of arbitrary discrimination, in the lending practices of federally chartered savings and loan associations.

In 1972 the Board, pursuant to authority conferred upon it by various statutes, including § 5(a) of HOLA, 12 U.S.C. §1464(a), adopted a regulation, 12 C.F.R. §528.2, which provided, in pertinent part, that no federal association:

> ". . . shall deny a loan or other service . . . because of the race, color, religion, sex, or national origin of . . . [t]he

present or prospective owners . . . or occupant of other dwellings in the vicinity of the dwelling . . . in relation to which such loan or other service is to be made or given."[4]

The Board interpreted its regulations as prohibiting the use of appraisal forms which even called for information relating to the ethnicity of a neighborhood:

". . . to extend credit on the basis of an appraisal form which calls for information relating to the ethnic composition of a neighborhood violates . . . the Board's regulations [including 12 C.F.R. §528.2].

* * *

"The use of appraisal forms which calls for racial information regarding the neighborhood clearly violates the well-established legal prohibition against consideration of racial factors in real estate transactions." (Opinion of the General Counsel of the Federal Home Loan Bank Board, dated February 7, 1974.) (C.T., pp. 307-308.)

Moreover, and perhaps of even greater significance, the Board has interpreted its regulations as prohibiting lending practices which were discriminatory *in effect* even though not racially motivated in their origins:

"Section 528.2 of the Regulations of the Federal Home Loan Bank System prohibits denying a loan, or discriminating in fixing loan terms, 'because of the race, color, religion or national origin of . . . (d) the present or prospective owners, lessees, tenants or occupants of other dwellings in the vicinity of the dwelling or dwellings in relation to which such loan or other service is to be made or given'.

[4] Actually the regulation was applicable, subject to exceptions not here relevant, to "any institution which is a member of a Federal Home Loan Bank". All federal savings and loan associations are, by operation of law, members of a Federal Home Loan Bank. 12 U.S.C. §1464(f).

". . . [I]t is my opinion that the practice by member institutions of refusing to extend credit, and the practice of extending credit on terms which are less favorable than those usually offered, to borrowers whose security property is located within a predetermined geographic area or areas, because of the location of the property, violate section 528.2(d) if such practices have a discriminatory effect against members of racial, ethnic or religious groups. Although the question whether, in a particular situation, the practice of redlining has an unlawful discriminatory effect is essentially a question of fact, it is my opinion that in certain circumstances outlined below, a prima facie case of discrimination may be considered to be established, which must be rebutted by the institution concerned with clear evidence that the practice is a matter of business necessity and that no less discriminatory means are available to assure sound lending." (Opinion of the General Counsel of the Federal Home Loan Bank Board, dated March 21, 1974.) (C.T., pp. 309-310.)

On November 1 and 2, 1977, the Board adopted resolutions proposing, and on May 18, 1978, adopted a resolution finally promulgating, amended "fair lending" regulations, 12 C.F.R. §528. *The stated authorities for the promulgation of such new regulations included HOLA;* and the May 18 resolution adopting the amended regulations recited that "*it is the Bank Board's intent that Federally-chartered savings and loan institutions shall be governed solely by . . . [12 C.F.R. §§528 and 531.8]*". (*Federal Register,* Vol. 43, No. 102, p. 22333; emphasis added.)[5] Moreover, effective March 14, 1979, the Board promulgated another regulation, 12 C.F.R. § 545.6a, which provides that "[n]otwithstanding any state law to the contrary,

[5] Any representation by the Secretary or the *amici curiae* supporting his position (see, e.g., "Jurisdictional Statement", pp. 14-15; "Brief Amicus Curiae for the N.A.A.C.P. Legal Defense and Education Fund", pp. 1-5) that the Board's "fair lending" regulations were

(Footnote continued on following page)

Federal associations are governed solely by the fair lending provision of Part 528 and § 531.8 of the Rules and Regulations for the Federal Home Loan Bank System and other applicable Federal laws and regulations."

The new regulations augmented and strengthened the Board's prohibition against "redlining" and other forms of arbitrary discrimination by federal associations. They provide, *inter alia,* and in essence 1) that no federal association may discriminate in its lending practices and procedures "on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex, or national origin" of the loan applicant or other person associated with the transaction, or may "use or rely upon an appraisal of a dwelling which the institution knows, or reasonably should know, is discriminatory on the basis of the age or location of the dwelling, or is discriminatory *per se* or in effect"; 2) that each federal association "shall have clearly written, nondiscriminatory loan underwriting standards [which are reviewed periodically], available to the public upon request, at each of its offices"; 3) that no federal association may "engage in any form of advertising which implies or suggests a policy of discrimination or exclusion in violation of Title VIII of the Civil Rights Act of 1968, the

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(Footnote continued from preceding page)

adopted exclusively pursuant to federal civil rights statutes such as the Equal Credit Opportunity Act, 15 U.S.C. §1691 *eq seq.* and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.,* and not pursuant to HOLA, is simply untrue.

That HOLA in and of itself authorizes the Board to promulgate "fair lending" regulations applicable to federal associations is clear. Under § 5(a) of HOLA, 12 U.S.C. 1464(a), the Board is mandated to regulate all aspects of the operation of federal associations, "giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States". The eschewment of "redlining" and other forms of arbitrary discrimination in mortgage lending is obviously such a "best practice" and thus within the power of the Board to order.

Like the original regulation, the amended regulations are applicable to all Federal Home Loan Bank members. (See footnote 4, *supra.*)

Equal Credit Opportunity Act, or this Part [12 C.F.R. §528]"; 4) that "[a]dvertisements other than for savings shall include a fascimile" of a specified logotype and either the legend "Equal Opportunity Lender" or "Equal Housing Lender", and that each federal association "shall post and maintain . . . in the lobby of each of its offices" a poster bearing a specified logotype and the legend "Equal Opportunity Lender" and apprising prospective borrowers of their legal rights.[6] The regulations also establish procedures for monitoring compliance therewith, including a requirement that federal associations prepare and maintain, and report to the Board based upon, certain records and data.

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[6] The prescribed text is as follows:

"WE DO BUSINESS IN ACCORDANCE WITH THE FEDERAL FAIR HOUSING LAW AND THE EQUAL CREDIT OPPORTUNITY ACT

IT IS ILLEGAL TO:

DISCOURAGE a loan inquiry or refuse to accept a written loan application;

DISCRIMINATE in fixing the amount, interest rate, duration, application procedures, or other terms or conditions of a loan; or

DENY a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling.

ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, MARITAL STATUS OR AGE;

OR BECAUSE
A PERSON RECEIVES INCOME FROM A PUBLIC ASSISTANCE PROGRAM, OR HAS IN GOOD FAITH EXERCISED ANY RIGHT UNDER THE CONSUMER CREDIT PROTECTION ACT

* * *

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU MAY:

SPEAK with the management of this institution;

COMPLAIN to The Office of Community Investment, Federal Home Loan Bank Board, Washington, D.C. 20522 or the Assistant Secretary for Fair Housing and Urban Development, Washington, D.C. 20010; or

CONSIDER filing a civil suit under Federal Laws."

In addition, the Board has promulgated, pursuant to authority conferred by HOLA, extensive and highly detailed regulations governing the making and collateralization of mortgage loans by federally chartered savings and loan associations, 12 C.F.R. §545.6-9. Such regulations, *inter alia,* prescribe minimum ratios between the amount of the loan and the value of the real property hypothecated as security therefor.

Efforts by California to control "redlining" and other forms of arbitrary discrimination in lending did not commence until approximately four years after the Board had first promulgated its "fair lending" regulations. In mid 1976, however, an agency which operates under the aegis of the Secretary, the Department of Savings and Loan, promulgated pursuant to its general supervisory authority under California Financial Code §5255 a body of so-called "fair lending" regulations applicable to the state-chartered — but not federally chartered — savings and loan associations doing business in California. (10 Cal. Adm. Code Tit. 10, §245 *et seq.*)

Eventually, late in 1977, the State of California enacted California Health and Safety Code §35800 *et seq.* ("the state 'fair lending' law"). Among other things, it 1) prohibits "redlining" and other forms of arbitrary discrimination in lending by, *inter alia,* "any . . . savings and loan association . . . that regularly makes, arranges, or purchases loans for the purchase, construction, rehabilitation, improvement, or refinancing of housing accommodations"; 2) directs the Secretary to "issue such rules, regulations, guidelines and orders as are necessary" to implement, and to "monitor and investigate the lending patterns and practices of financial institutions for compliance" with, the substantive provisions of the statute; 3) provides that "[a]ny applicant for a real estate loan in connection with housing accommodation claimed to be aggrieved by an alleged violation . . . [of the substantive prohibitions of the statute] . . . may file a complaint with" the Secretary and "[i]mmediately upon receipt of the complaint,

the secretary shall endeavor to eliminate any alleged unlawful practice, by conference, conciliation, or persuasion"; 4) creates an administrative system, for redressing alleged violations of the substantive prohibitions of the legislation, under which the Secretary is authorized to order either "[t]he making of the financial assistance or the making of the financial assistance on nondiscriminatory terms" or "[t]he payment of damages to the complainant" in an amount of as much as $1,000; and 5) requires that certain notices be given by lenders to whom the statute is applicable.

The legislation did not contain a definition of the term "savings and loan association"; and in other California legislative contexts that term does *not* include federally chartered savings and loan associations. For example, for purposes of the California Savings and Loan Association Law, California Financial Code §5000 *et seq.,* a "'[s]avings and loan association' means any institution incorporated to conduct, or conducting, the business of receiving and lending money in accordance with the provisions of this part, *except federal savings and loan associations".* (California Financial Code §5057; emphasis added.) Moreover, California Financial Code §9257 provides that "[a]t the time the conversion [of a state-chartered savings and loan association] into a federal savings and loan association becomes effective *the association ceases to be supervised by this State. . . .*" (Emphasis added.)

Furthermore, *prior to the enactment of the state "fair lending" law, counsel for the Secretary in the within purported appeal and the chief legal officer of the state, the California Attorney General, had rendered a legal opinion that federal law precluded California from regulating the operations of federal savings and loan associations.* In 1964 California enacted a statute, California Financial Code §11500, *et seq.,* which imposed certain registration and reporting requirements upon savings and loan holding companies; and for purposes of the statute a "savings and loan holding company" was defined to

include persons or companies which control federal savings and loan associations (California Financial Code §11500). On August 24, 1964, however, in response to an inquiry from the then California Savings and Loan Commissioner, *the Attorney General opined that federal law preempted the field with respect to the supervision and regulation of federal associations and hence to the extent that the California statute purported to apply to persons or companies which controlled federal associations it was invalid:*

> "Federal savings and loan associations are organized under the Home Owners Loan Act of 1933. 48 Stat. 128 (1933), 12 U.S.C. §§1461-68 (1958). *A federal association is an instrumentality and agency of the United States.* [Citations omitted.] *The Federal Home Loan Bank Board is the regulatory agency charged with the duty of supervising federal associations. Congress has delegated the duty and authority to the Bank Board to make policy, including the power, 'under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of [federal] associations. . . .'* 48 Stat. 132 (1933), 12 U.S.C. §1464(a) (1958). The constitutionality of this delegation of authority was upheld in *Fahey v. Mallonee,* 332 U.S. 245 (1947). *The Bank Board has adopted comprehensive rules concerning the formation, operation, management, examination and liquidation of federal associations.* 12 C.F.R. §§541.1-555.11 (1963). *These rules have been described as regulating a federal association 'from its cradle to its corporate grave.'* [Citation omitted.] *Rules promulgated by the Bank Board have the force and effect of law.* [Citations omitted.]
>
> "Several terms have been used to describe the situation where state law must yield to the supremacy of the federal law—conflicting, contrary to, occupying the field, repugnancy, difference, irreconcilability, inconsistency, curtailment, interference, but 'in the final analysis, there

> can be no one crystal-clear distinctly marked formula.' [Citations omitted.] However, one test used by the courts is whether the scheme of federal regulation '[is] . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it'. [Citations omitted.]
>
> "*Courts that have considered the question of applying state regulations to federal associations have concluded there is no room for state supervision of federal associations.* [Citations omitted.]
>
> * * *
>
> "*In our opinion, the [California] Savings and Loan Holding Company Law reaches into an area — control and supervision of federal associations — which, under the authority cited above, has been pre-empted by Congress.*" (44 Attorney General's Opinions 50, pp. 53-54 (Sept. 1964); emphasis added.)

On December 14, 1977, after the state "fair lending" law had been enacted, but prior to its effective date, the Secretary met in Los Angeles, California, with "numerous officers of various savings and loan associations located within the State of California", including officers of federally chartered savings and loan associations, to discuss "so-called 'redlining' regulations which . . . [he] intended to issue pursuant to" the state "fair lending" law. At the meeting he "stated that he was not concerned with federal regulations and that it was his position that all savings and loan associations operating within the State of California, including federally chartered associations, would be required to operate under California state regulations irrespective of the provisions of federal regulations". (C.T., p. 100, line 24 to p. 101, line 10.)

The Secretary then sent to the federal associations, *inter alia*, a letter, dated December 15, 1977, which informed them of the state "fair lending" law and ordered them to give to potential loan applicants, and to post "in a conspicuous place for public inspection" in their respective offices on and after January 1, 1978, a prescribed "Fair Lending Notice".[7]

The Board thereupon interceded. On February 2, 1978, it issued a legal opinion that the state "fair lending" law was inapplicable to federally chartered savings and loan associations operating in California and, accordingly, that they were not required to post the "Fair Lending Notice" prescribed by the Secretary. (C.T., pp. 106-115.)

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[7] The text of the notice is as follows:

"STATE OF CALIFORNIA
FAIR LENDING NOTICE

TO: ALL APPLICANTS FOR A LOAN FOR THE PURCHASE, CONSTRUCTION, REHABILITATION, IMPROVEMENT OR REFINANCING OF A ONE-TO-FOUR FAMILY RESIDENCE.

UNDER THE HOUSING FINANCIAL DISCRIMINATION ACT OF 1977, IT IS UNLAWFUL FOR A FINANCIAL INSTITUTION TO REFUSE TO MAKE A LOAN OR TO OFFER LESS FAVORABLE TERMS THAN NORMAL (SUCH AS A HIGHER INTEREST RATE, LARGER DOWN PAYMENT OR SHORTER MATURITY) BASED ON ANY OF THE FOLLOWING CONSIDERATIONS:

1. NEIGHBORHOOD CHARACTERISTICS (SUCH AS THE AVERAGE AGE OF THE HOMES OR THE INCOME LEVEL IN THE NEIGHBORHOOD) EXCEPT TO A LIMITED EXTENT NECESSARY TO AVOID AN UNSAFE AND UNSOUND BUSINESS PRACTICE.
2. RACE, SEX, COLOR, RELIGION, MARITAL STATUS, NATIONAL ORIGIN OR ANCESTORY [SIC].

(Footnote continued on following page)

A few days later, on February 6, 1978, the federal associations instituted, against both the Secretary and the Board, the action from which the within purported appeal arises. The relief sought consisted of a declaration that HOLA and regulations promulgated by the Board pursuant thereto preempted the field with respect to the "fair lending" practices of federal savings and loan associations, thereby precluding the application to federal associations of the state "fair lending" law, and appropriate interlocutory and permanent injunctive relief.[8]

(Footnote continued from preceding page)

IT IS ALSO UNLAWFUL TO CONSIDER, IN APPRAISING A RESIDENCE, THE RACIAL, ETHNIC, OR RELIGIOUS COMPOSITIONS OF A PARTICULAR NEIGHBORHOOD, WHETHER OR NOT SUCH COMPOSITION IS UNDERGOING CHANGE OR IS EXPECTED TO UNDERGO CHANGE.

IF YOU WISH TO FILE A COMPLAINT, OR IF YOU HAVE QUESTIONS ABOUT YOUR RIGHTS, CONTACT:

OFFICE OF FAIR LENDING
BUSINESS & TRANSPORTATION AGENCY
1120 N Street
Sacramento, CA 95814

OR CALL *COLLECT*: (916) 322-9851

IF YOU FILE A COMPLAINT, THE LAW REQUIRES THAT YOU RECEIVE A DECISION WITHIN THIRTY (30) DAYS.

I (WE) RECEIVED A COPY OF THIS NOTICE.

_____
Signature of Applicant Date"

[8] The complaint also described, and sought declaratory and injunctive relief with respect to, a dispute between the federal associations, the Secretary and the Board concerning the application of California law to the exercise of "due on" clauses in mortgage loan contracts between federal associations and their borrower-members. That aspect of the complaint was not adjudicated by the District Court until after entry of the judgment from which the instant purported appeal is taken. The District Court has now ruled in favor of the federal associations and the Board, and the Secretary has appealed to the Court of Appeals.

On February 10, 1978, the Board filed an answer and cross-claim in which it admitted essentially all of the material charging allegations of the complaint and, in addition, itself cross-complained against the Secretary for declaratory and injunctive relief. The relief which it sought consisted, *inter alia,* of a declaration that:

> "1. The Board's current regulation and statement of policy, 12 C.F.R. §§528.2 and 531.8 and other federal statutes constitute the exclusive law governing nondiscrimination-in-lending requirements imposed on federal savings and loan associations in California and throughout the country;
>
> "2. In the HOLA, the Congress delegated to the Board exclusive authority to regulate and supervise the lending practices of federal savings and loan associations throughout the country;
>
> "3. The provisions of the Act (Section 35800 through 35833 of the California Health and Safety Code) and present and future regulations of defendant Silberman thereunder, are not applicable to the operations of federally chartered savings and loan associations in California." (C.T., p. 83, lines 12-24.)[9]

Three weeks after the commencement of the action below, on February 28, 1978, the Secretary himself commenced an action in the San Mateo County Superior Court to compel compliance by federal associations with the state "fair lending" law, *People of the State of California, et al. v. West Coast Federal Savings and Loan Association, etc., et al.,* S.M.C.S.C. No. 220012 ("the *West Coast Federal* action"). In it he sought

[9] The cross-claim also described, and sought declaratory relief with respect to, the application of California law to the "due on" practices of federally chartered savings and loan associations. (C.T., p. 81, line 30 to p. 82, line 28.)

to impose upon the named defendant, West Coast Federal Savings and Loan Association, and one hundred "doe" defendants, a penalty of $2,500 for each violation by each association of the order to post and disseminate the "Fair Lending Notice" which he prescribed.[10]

The Board responded by amending its cross-claim against the Secretary to add a count and prayer for temporary interlocutory and permanent injunctive relief restraining the Secretary and "all persons acting in concert with him" from seeking to compel federal savings and loan associations to conform to the state "fair lending" law. (C.T., p. 170, line 15 to p. 172, line 1.)

On March 7, 1978, the federal associations filed a notice of motion and motion for partial summary judgment in which they sought a declaratory judgment that, *inter alia:*

[10] The federal associations submitted to the District Court declarations that the penalties sought by the Secretary against West Coast Federal Savings and Loan Association in the *West Coast Federal* action would alone amount to approximately ten million dollars per annum, more than half of the total net worth of the association; assuming that the "doe" defendants were all other federal associations in California, that the aggregate penalties sought would amount to in excess of nine hundred million dollars per annum, more than half of the total net worth of all federal associations in California; and that imposition of such penalties would effectively destroy the federal savings and loan system in California. (C.T., p. 294, lines 23-31; C.T., p. 392, line 25 to p. 399, line 22.)

In response the Secretary submitted a declaration which did not dispute the accuracy of Appellees' description of the relief sought or the consequences which would ensue from its application but, instead, argued that California law "does not mandate that the court impose a fine of $2,500 per violation" but merely provides for a "civil penalty *not to exceed* two thousand five hundred dollars . . ."; and that "[c]ertainly any state court in applying civil penalty provisions . . . will carefully weigh and consider any mitigating circumstances such as, for example, reliance by a federal savings and loan association on the pronouncements of its regulator". (C.T. p. 370, lines 7-22).

a. The Secretary "has no authority to require that . . . [the federal associations] comply with his order of December 15, 1977 . . ."; and

b. The Secretary "may not require . . . [the federal associations] to report on his forms, or keep records in the manner prescribed by him, as to nondiscrimination in their lending operations" or "to give notice to their borrowing-members and prospective borrowing-members to address their complaints about non-discrimination in lending practices . . ." to the Secretary or "to request such information as to their rights" from the Secretary. (C.T., p. 90, line 11 to p. 91, line 11.)

In response, on March 13, 1978, the Secretary moved to dismiss the action on the ground, *inter alia,* that the complaint and cross-claim each failed to state a claim upon which relief could be granted. (C.T., pp. 174-184.)

The District Court heard the respective motions, took them under submission, and on May 10, 1978, announced its intended decision.

In its statement of intended decision, the District Court explained, *inter alia,* that the Board's "exercise of its plenary regulatory power [12 U.S.C. 1464(a)] . . . 'to provide for the organization, incorporation, examination, operation and regulation . . . '" of federally chartered savings and loan associations "preempts legislation by the State of California which attempts to subject federally chartered savings and loans to state regulation and discipline in the area of anti-redlining practices" and that "[l]anguage contained in the Equal Credit Opportunity Act, 15 U.S.C. §1691 *et seq.,* and in the Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§2801-2809, in no way limits the Federal Home Bank's plenary regulatory power under the Home Owners' Loan Act of 1933, 12 U.S.C. §1461 et seq." ("Jurisdictional Statement", App., pp. 11-15.)[11]

[11] Also before the District Court was a motion by the Board for a preliminary injunction against the Secretary and persons acting in concert with him "enforcing, or seeking to enforce, the provisions

(Footnote continued on following page)

Based upon the foregoing statement of intended decision, the District Court entered the order denying the motion to dismiss and the order granting partial summary judgment and directed the entry of a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. ("Jurisdictional Statement", App., pp. 16-23.) The Secretary appealed from such orders to the Court of Appeals. (*Id.,* p. 80.)

C. *The Judgment of the Court of Appeals*

The Court of Appeals declined to pass upon the question of whether those aspects of the state "fair lending" law which purported to confer substantive rights upon borrowers were preempted, explaining that "[n]o dispute presently exists as to" that issue and that "[w]e are not faced with a suit by a borrower against a federal association charging violation of a substantive state regulation". ("Jurisdictional Statement", App., p. 9.)

Rather, the Court of Appeals confined itself to the question of whether the Secretary could lawfully apply "the procedural aspects" of the state "fair lending" law to federal associations

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of . . . [the state 'fair lending' law], or provisions of regulations issued or promulgated thereunder, against any federally chartered saving and loan association or associations, or from assessing or attempting to assess a penalty on such federal associations for any alleged noncompliance with the Act during the period from February 6, 1978—when this action was originally filed—until final judgment is rendered". (C.T., p. 224, lines 8-17.) With respect to such motion the District Court explained that while it could "be granted under the authority of *NLRB* v. *Nash-Finch Company,* 404 U.S. 138, 144 (1941) and its progeny, such an order would appear to be unnecessary in the light of this Court's ruling on plaintiff's motion for partial summary judgment . . ."; but that "should circumstances arise where such an injunction might be necessary in aid of this Court's jurisdiction or to protect and effectuate its judgments . . . the Court would entertain a renewal of the motion". (C.T., p. 1100, line 22 to p. 1101, line 2.)

since "[i]t is the regulatory authority of appellant [the Secretary] over the federal associations in these respects that is here in dispute".[12] Concluding that the answer to this question was in the negative, the Court of Appeals affirmed the judgment of the District Court, explaining:

> "*In our judgment the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control.* As this court noted in *Meyers v. Beverly Hills Federal Savings & Loan Ass'n,* 499 F.2d 1145, 1147 (9th Cir. 1974):
>
> > 'Pursuant to its valid statutory authority, the Federal Home Loan Bank Board has promulgated comprehensive regulations covering all aspects of every federal savings and loan association "from its cradle to its corporate grave". *People of State of California v. Coast Federal Savings and Loan Ass'n,* S.D. Ca. 1951, 98 F.Supp. 311, 316.'

[12] In his Jurisdictional Statement the Secretary purports to find the distinction drawn by the Court of Appeals between the substantive and procedural aspects of the state fair lending law "inexplicable" ("Jurisdictional Statement," p. 6, n. 2). Yet the Secretary, expressly recognizes—and indeed relies upon—that distinction in his opening brief in *Glendale Federal Savings and Loan Association v. Fox, etc.,* Ninth Circuit No. 79-3573, p. 52, an appeal in which the Secretary is represented by the same counsel that represents the Secretary in the case at bar:

> "The instant case presents an issue left open by this court in *Conference of Federal Sav. & Loan Ass'n v. Stein,* 604 F.2d 1256 (9th Cir. 1979). In that case, the court held that state procedural regulations applicable to federal associations were preempted. The court, however, expressly declined to reach the issue of whether substantive rights of citizens conferred by state law were preempted. We deal here with the substantive rights of state citizens under state law. Thus, *Conference* is inapplicable."

> "*The broad regulatory authority over the federal associations conferred upon the Bank Board by HOLA does wholly pre-empt the field of regulatory control over these associations.* If state-conferred rights are to be enforced against the federal associations by any regulatory body (a question we do not reach), enforcement must be by the Bank Board." ("Jurisdictional Statement", App., pp. 9-10; emphasis added.)[13]

It is from the judgment of the Court of Appeals that the Secretary prosecutes the instant purported appeal.

IV

ARGUMENT

A. *The Judgment Of The Court Of Appeals Did Not Hold A California Statute Invalid, As Required By 28 U.S.C. §1254(2).*

As set forth in §I, *supra,* 28 U.S.C. §1254(2) provides, in pertinent part, that "[c]ases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ." In the instant case the Secretary argues that the judgment of the Court of Appeals held that the state "fair lending" law was invalid insofar as it applied to federal associations and, therefore, that this Court has jurisdiction over its appeal pursuant to §1254(2). ("Jurisdictional Statement", p.3.)

[13] The Comptroller of the Currency had previously advised the Governor or the State of California, in a letter dated June 19, 1978, that while "the substantive nondiscrimination provisions contained in . . . [the state 'fair lending' law] apply to national banks . . . the state's enforcement mechanism and complaint resolution process are pre-empted in the case of national banks by the Comptroller's

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Perhaps because of the infrequency with which it has been invoked as a basis for Supreme Court appellate jurisdiction, there is a paucity of reported cases that address the question of what constitutes a judgment of a court of appeals holding a state statute invalid for purposes of §1254(2). Nevertheless, based upon an analysis of whatever case law exists, the federal associations believe that there is at least a serious question as to whether a court of appeals judgment constitutes such a holding when it merely determines that federal law would preempt the application of a state statute without reaching the question of whether the state statute was actually intended to apply in the premises.

In the only case law authority cited by the Secretary in this regard, *Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972), *aff'g* 447 F.2d 1143 (8th Cir. 1971), appellate jurisdiction was not contested and thus the issue of whether the judgment satisfied the requirements of §1254(2) in light of its failure to expressly hold that state law was intended to apply was never explicitly addressed by this Court.

Moreover, several recent decisions of this Court, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), reh'g den., 431 U.S. 925 (1977), and *Minnesota, etc. v. Clifford L. Alexander, Secretary of the Army, et al.*, 430 U.S. 977 (1977), suggest that in order for this Court to have jurisdiction under 28 U.S.C. §1254(2),

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congressionally-mandated regulatory and supervisory responsibilities"; and, in response, the State of California agreed that the enforcement mechanism and complaint resolution process provided for in the state "fair lending" law would not be applied to national banks—this despite the enormous involvement of national banks (such as Bank of America National Trust and Savings Association) in residential mortgage lending activities. ("REPLY TO AMICUS CURIAE BRIEF" in Court of Appeals, Exhibits "A" and "B".) Thus the effect of the Court of Appeals' decision was merely to create a parity between federal associations and national banks vis-a-vis the procedural aspects of the state "fair lending" law.

the judgment of the court of appeals must determine that the state law was intended to apply in the premises and that a determination that state law could not apply because federal law would preempt such application is not, in and of itself, sufficient.

In *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), the Court of Appeals held that a federal statute, the Wholesome Meat Act of 1967, 21 U.S.C. §601 *et seq.*, preempted, with respect to a corporation engaged in interstate commerce, application of a California statute, California Business and Professions Code §17500 *et seq.*; but it did not expressly reach the question of whether the state law was intended to apply in the premises (although such an intention appears to have been assumed) and therefore did not determine that the state law was invalid. The judgment of the Court of Appeals was reviewed on a writ of certiorari and affirmed, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

An appeal, of course, entitles a party to Supreme Court review as a matter of right, whereas a petition for review by writ of certiorari does not. (Rule 19, Rules of the United States Supreme Court.) Hence had the judgment of the Court of Appeals invalidated a state statute within the meaning of 28 U.S.C. §1254(2), why would the losing party have sought review by writ of certiorari rather than appeal? The answer, presumably, is that the losing party — an officer of the State of California represented by the Attorney General of the State of California — did not believe that the judgment of the Court of Appeals was one which invalidated a state statute and thus came within the ambit of §1254(2).

Even more compelling, in *State of Minn., by Spannaus v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976), the State of Minnesota, acting through its Attorney General and its Pollution Control Agency, brought an action against the Secretary of the Army and the Army Corps of Engineers, seeking a declaration that the Federal Water Pollution Control Act Amendments of 1972,

33 U.S.C. §1251 *et seq.* "'grants to Minnesota authority to require defendants to comply with state pollution abatement requirements including obtaining a state discharge permit'". The United States District Court for the Eastern District of Minnesota found in favor of the plaintiffs and the defendants appealed to the United States Court of Appeals for the Eighth Circuit.

The Court of Appeals, without expressly reaching the question of whether Minnesota law was intended to apply in the premises (although it appeared to assume that such application was intended), concluded that the Federal Water Pollution Control Act of 1972 did not subject the Army Corps of Engineers to state water pollution laws with respect to operations conducted in navigable waters; and, accordingly, it reversed the judgment of the District Court, explaining:

> "In light of the principles we have discussed, the Supremacy Clause, the legislative history of the [Federal Water Pollution Control] Act, as well as its internal structure, we find with respect to the disposal of dredged material by the Corps, that there is insufficient evidence to meet the clear and unequivocal standard for finding Congressional authorization for state regulation . . . Regulation by the various States of the Union, each with its own requirements, could result in a conceivably chaotic situation as riverborne traffic moved from the boundaries of one state to those of another. We find no authorization of such state regulation in the legislative history of the Act or its several sections. We hold that the Congress did not intend a subordination of the federal power and authority in this area to State control." (543 F.2d 1209.)

The plaintiffs purported to appeal to this Court pursuant to 28 U.S.C. §1254(2). This Court, however, dismissed the appeal "for want of jurisdiction". *Minnesota, etc. v. Clifford L. Alexander, Secretary of the Army, et al.*, 430 U.S. 977 (1977). Moreover, in a dissenting opinion Justice Stevens, joined by Justices Marshall and Rehnquist, observed:

> "Our mandatory jurisdiction includes cases in which a Court of Appeals holds a state statute 'invalid as repugnant to the Constitution, treaties or laws of the United States . . .' 28 U.S.C. §1254(2). The Secretary of the Army concedes that '[b]y holding that the federal statute did not waive the traditional immunity of the Corps of Engineers from state regulation, the court implicitly held that the purported reach of state laws over the Corps' dredging activities was invalid under the Supremacy Clause . . .'
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> . . . In *City of Detroit v. Murray Corp.*, 355 U.S. 489 . . . the Court of Appeals . . . had ruled that, as applied, a state taxing statute invaded the Federal Government's immunity from state taxation. This Court postponed the question of appellate jurisdiction to the hearing on the merits, but then held without explanation that an appeal was proper. . . . A similar result should apply to a holding that a state statute invaded the Federal Government's immunity from unconsented state regulation. *It is arguable, of course, that our mandatory appellate jurisdiction is defeated by the Court of Appeals' failure to make express its invalidation of the statute as applied to the Corps . . .*" (430 U.S. 978, n. 1; emphasis added.)

The judgment of the Court of Appeals in the instant case and the judgment of the Court of Appeals in *State of Minnesota* are "on all fours" in respects here material. The judgment of the Court of Appeals in the instant case failed to reach the question of whether the California "fair lending" law was intended to apply to federal associations; the judgment of the Court of Appeals in *State of Minnesota* failed to reach the question of whether the Minnesota water pollution laws were intended to apply to the Army Corps of Engineers; the judgment of the Court of Appeals in the instant case determined

that under the supremacy doctrine of the United States Constitution the states were precluded from exercising regulatory control over federal savings and loan associations with respect to their lending practices; and the judgment of the Court of Appeals in *State of Minnesota* determined that the states were precluded from exercising regulatory control over the Army Corps of Engineers with respect to its operations in navigable waters. Hence if the judgment of the Court of Appeals in *State of Minnesota* did not present a judgment which declared a state statute invalid under federal law within the meaning of 28 U.S.C. §1254(2), neither does the judgment of the Court of Appeals in the instant case.

In point of fact, and while the District Court did find such intent ("Jurisdictional Statement", App., p. 20), there is, at the least, substantial doubt that the state "fair lending" law actually was intended to apply to federal associations.

First, while the state "fair lending" law does not expressly provide that it does *not* apply to federal associations, neither does it expressly provide that it *does* so apply.

Second, under California law it may be presumed, for purposes of legislative interpretation, that a term used in a statute was intended to have the same meaning as that accorded to it in other statutes with which it is in *pari materia.* (See, e.g., *In re Phyle,* 30 Cal.2d 838, 845 (1947); *In re Marriage of Pinto,* 28 Cal.App.3d 86, 89 (1972); see also *Marks v. United States,* 161 U.S. 297, 304 (1896).) Here the state "fair lending" law employs the term "savings and loan association" without defining it; yet another California statute which deals with the regulation of savings and loan associations and with which the state "fair lending" law is, therefore, presumably in *pari materia* defines the term "savings and loan association" as *not* including federal savings and loan associations. (California Financial Code §5057; see also California Financial Code §9257.)

Third, under California law it is presumed that a legislative body acts with knowledge of, and in light of, existing laws and judicial decisions. See, e.g., *Estate of McDill,* 14 Cal.3d 831, 839 (1975). Moreover, "it should not 'be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication'". *Theodor v. Superior Court,* 8 Cal.3d 77, 92 (1972). Here the California legislature enacted the state "fair lending" law against the background of an overwhelming body of case law to the effect that the states do not have authority to regulate the operations of federal associations. (See §IV B.1., *infra.) Indeed, the chief legal officer of California (and counsel for the Secretary here) had previously repudiated as unconstitutional an effort by the legislature, through the enactment of Financial Code §11500, to exercise such authority. In light of the foregoing, had the legislature intended in enacting the state "fair lending" law to once again attempt to assert dominion over federal associations, is it not reasonable to assume that the intention would have been clearly manifested through an express declaration to that effect rather than left to doubtful inference?*

B. *The Purported Appeal Of The Secretary From The Judgment Of The Court Of Appeals Does Not Present A Question Which Is Sufficiently Substantial To Warrant Further Argument And, Accordingly, The Judgment of The Court Of Appeals Should Be Summarily Affirmed.*

As set forth in §IV A., *supra,* it is the position of the federal associations that the judgment of the Court of Appeals failed to hold the state "fair lending" law invalid and, accordingly, is not subject to appeal to this Court pursuant to 28 U.S.C. §1254(2). Even assuming *arguendo,* however, that the judgment *did* hold the state "fair lending" law invalid, nonetheless in order for this Court to entertain an appeal it must present a question which is sufficiently substantial to warrant further argument. Rule 15(1)(e) and (f), Rules of the United States Supreme Court; *Zucht v. King,* 260 U.S. 174, 176 (1922). Here the judgment of

the Court of Appeals to the effect that federal law precludes the Secretary from imposing upon federal associations the procedural requirements of the state "fair lending" law is so clearly correct that no such question is presented and, therefore, the judgment of the Court of Appeals should be summarily affirmed.[14]

1. **Federal Preemption Of A Mortgage Lending Practice Of Federal Associations With Respect To Which The Board Has Promulgated A Specific Regulation Pursuant To HOLA Is Well Settled.**

HOLA and the regulations promulgated thereunder probably preempt the field with respect to all mortgage lending practices of federally chartered savings and loan associations, whether or not there is a specific regulation on point, and they indisputably do so with respect to any matter as to which there is such a specific regulation.[15] See, e.g.:

First Fed. S. & L., Boston v. Greenwald, 591 F.2d 417, 425 (1st Cir. 1979);

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[14] Since this is a motion to dismiss or affirm rather than a brief on the merits of the controversy, the federal associations will present here only an abbreviated discussion of the applicable law. For a more comprehensive discussion, including the operation of the supremacy clause of the Constitution, Art. VI, cl. 2, and the legislative history of HOLA, see the "BRIEF FOR PLAINTIFFS-APPELLEES" in the Court of Appeals, pp. 36-70.

[15] It is the position of the federal associations that the promulgation by the Board, pursuant to the authority conferred upon it by § 5(a) of HOLA (12 U.S.C. §1464(a)), of comprehensive regulations governing the operation of federally chartered savings and loan associations effected a preemption of the "fair lending" practices of such associations and would have done so even in the absence of a specific regulation on point. (Indeed, it is the position of the federal associations that the enactment of HOLA itself effected such preemption.) Be that as it may, however, whether or not there would be federal preemption in absence of a specific Board regulation is a question that is not presented, and therefore need not be reached, in the within appeal.

Kupiec v. Republic Federal Savings & Loan Ass'n, 512 F.2d 147, 150 (7th Cir. 1975);

Meyers v. Beverly Hills Federal Savings & Loan Ass'n, 499 F.2d 1145, 1147 (9th Cir. 1974);

Central S. & L. Ass'n of Chariton, Iowa v. Federal H. L. B. Bd., 422 F.2d 504, 507 (8th Cir. 1970);

Murphy v. Colonial Federal Savings and Loan Association, 388 F.2d 609, 611 (2nd Cir. 1967);

North Arlington Nat. Bank v. Kearney Fed. Sav. & L. Ass'n, 187 F.2d 564, 565-566 (3rd Cir. 1951), *cert. den.,* 342 U.S. 816 (1951);

Bailey v. First Federal S & L Ass'n of Ottawa, 467 F.Supp. 1139, 1141 (C.D. Ill. 1979);

Glendale Fed. Sav. & Loan Ass'n v. Fox, 459 F.Supp. 903, 905 (C.D. Cal. 1978);

City Federal Savings & Loan Ass'n v. Crowley, 393 F.Supp. 644, 655 (E.D. Wis. 1975);

Lyons Savings & Loan Ass'n v. Federal Home Loan Bank Bd., 377 F. Supp. 11, 17-18 (N.D. Ill. 1974);

People, etc. v. Coast Federal Sav. & Loan Ass'n, 98 F.Supp. 311, 318-320 (S.D. Cal. 1951);

Madsen v. Prudential Federal Savings & Loan Ass'n, U.S.D.C., Utah, Civil No. 77-0350;

Nalore, et al. v. San Diego Federal Sav. & Loan Ass'n, U.S.D.C., S.D. Cal., Civil No. CV 77-0660-N;

Derenco, Inc. v. Benj. Franklin Fed. Sav. and Loan Ass'n, 281 Or. 533, 577 P.2d 477, 495-496 (1978), *cert. den.,* 439 U.S. 1051 (1978);

Kaski v. First Fed. S & L Ass'n of Madison, 72 Wis.2d 132, 240 N.W.2d 367, 372 (Wis. 1976);

Washington Fed. S. & L. Ass'n v. Balaban, 281 So.2d 15, 16-17 (Fla. 1973);

Springfield Institution v. Worcester Fed. S. & L. Ass'n, 329 Mass. 184, 107 N.E.2d 315, 317-318, *cert. den.,* 344 U.S. 884 (1952).[16]

An early and leading case on the issue of exclusive federal regulation of federally chartered savings and loan associations is *People, etc. v. Coast Federal Sav. and Loan Ass'n,* 98 F.Supp. 311 (S.D. Cal. 1951). In *People v. Coast Federal,* an action which was originally commenced in a California state court and removed to federal District Court, the People of the State of California and the then California Superintendent of Banks sought an injunction and the recovery of statutory penalties against a federal savings and loan association (one of the parties to the within appeal) on the ground that "through signs and other means of advertising, defendant [the federal association] has transacted business in the manner of a bank and has held itself out as a bank or savings bank, and has led the public to believe that it was such a bank, without authority and in violation of state statutes." (98 F.Supp. 315.)

The District Court dismissed the HOLA system of federal savings and loan associations, that the federal regulatory agency charged with responsibility for supervising them had prescribed its own regulation to control advertising practices of federal associations, and that therefore the state banking laws on the subject of advertising were inapplicable to federal savings and loan associations operating within the state:

> "Not only does the act of Congress [Home Owners' Loan Act of 1933] which authorized the creation, operation and supervision of federal savings and loan associations by the Home Loan Bank Board, embrace the entire field, but

[16] Indeed, just two years ago, the Court itself, in *First Federal Savings and Loan Ass'n* v. *Massachusetts Tax Com'n,* 437 U.S. 255, 258 n. 3 (1978), expressly recognized that HOLA "protects federal associations from being forced into the state regulatory mold."

> the comprehensive rules and regulations adopted by the Board clearly meet the test of covering the subject matter of the [state] statute. . . . It seems clear that Congress has preempted the field, making invalid the state statutes plaintiffs rely upon . . . when attempted to be invoked against a Federal savings and loan association. U.S. Constitution Art. VI, cl. 2. . .
>
> * * *
>
> ". . . The congressional mandate for uniformity would be destroyed if these associations were subject to federal control, plus concurrent state control, which latter control might vary in every one of the forty-eight states.
>
> * * *
>
> "Since the statutes upon which the complaint is based are invalid as applied to this defendant, a federal instrumentality, the complaint fails to state a claim upon which relief may be granted. . . ." (98 F.Supp. 318-320.)[17]

[17] The People of the State of California and the Superintendent of Banks of the State of California appealed to the United States Court of Appeals for the Ninth Circuit from the decision of the District Court, then moved to dismiss the appeal on the ground that the defendant, Coast Federal Savings and Loan Association, had discontinued the practices complained of in the action and thus rendered the appeal moot. The Court, in an order by Circuit Judges William Derman, Albert Lee Stephens and Walter L. Pope, did grant the motion to dismiss. In doing so, however, it expressly rejected the representation of the People of the State of California and the Superintendent of Banks that Coast Federal Savings and Loan Association had discontinued the practices of which they had complained and strongly implied that it regarded the holding of the District court as correct:

"The appellants move to dismiss their appeal. In the motion they make the statement that the appellee has discontinued and is not now committing the acts complained of in the complaint. There is

(Footnote continued on following page)

Another leading case on the issue of federal preemption is *Meyers v. Beverly Hills Federal Savings and Loan Ass'n,* 499 F.2d 1145 (9th Cir. 1974). There the plaintiffs brought an action in the state court against, *inter alia,* eight federally chartered savings and loan associations in California challenging the legality of provisions of their mortgage loan contracts authorizing them to assess charges in the event that the principal of a loan was repaid prior to maturity. After the action was removed, the District Court dismissed the action as against the federally chartered associations on the ground that federal law had preempted the field, and the plaintiffs appealed. (See 499 F.2d 1146.)

The United States Court of Appeals for the Ninth Circuit, after reviewing the doctrine of federal preemption, reaffirmed the holding of *People v. Coast Federal, supra,* that federal law had preempted the regulation of federally chartered savings and loan associations by reason of the Federal Home Loan Bank Board's promulgation of comprehensive regulations covering all aspects of their operations and sustained the judgment of dismissal, explaining:

> ". . . All of the appellee federal savings and loan associations operate and are organized and chartered under the Home Owner's Loan Act of 1933, 12 U.S.C. §1461 et seq. This Act established the Federal Home Loan Bank Board, which 'is authorized, under such rules and regulations as it may prescribe, to provide for the organization,

(Footnote continued from preceding page)

nothing in the record from which it appears that the appellee has discontinued any of the acts complained of in the complaint. On this matter it appears that the district court held that 'No evidence was offered which would support a finding that defendant (appellee) was actually transacting its business other than strictly within the limited perimeter of its expressly authorized field.'

"Appellants' motion to dismiss their appeal is granted, with costs against appellants." (Order in 9th Cir. No. 13119, filed June 3, 1952.)

> incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor. . . .' 12 U.S.C. §1464(a).
>
> "Pursuant to its valid statutory authority, the Federal Home Loan Bank Board has promulgated comprehensive regulations covering all aspects of every federal savings and loan association 'from its cradle to its corporate grave' " (499 F.2d 1146-1147.)[18]

Similarly in *Lyons Savings & Loan Ass'n v. Federal Home Loan Bank Bd.,* 377 F.Supp. 11 (N.D. Ill. 1974), an Illinois state chartered savings and loan association brought an action against two federally chartered savings and loan associations and the Federal Home Loan Bank Board, contending, *inter alia,* that federally chartered associations were subject to Illinois State prohibitions against branching. The District Court rejected this contention on the ground of federal preemption, stating:

> ". . . *courts have upheld the authority of the Board on the basis that the plenary powers given to the Board in the HOLA clearly evidence a Congressional intention to preempt the field, thus precluding any regulation of federal associations by state law.*

[18] With respect to the specific area of controversy, prepayment charges on mortgage loan contracts, the Court of Appeals observed:

> "Section [12 C.F.R. §] 545.6-12(b) [specifically covering the area of prepayment charges] represents a valid exercise of the Federal Home Loan Bank Board's delegated power, and we therefore hold *that federal law preempts the field of prepayment of real estate loans to federally chartered savings and loan associations, so that any California law in the area is inapplicable to federal savings and loan associations operating within California.* (Id., p. 1147; emphasis added.)

* * *

"[U]nlike the National Bank Act which ties branching policies of national banks directly into each state's laws, *the HOLA directs the Board to give 'primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States' . . . the courts have construed this language as vesting discretion in the Board to determine first, what the 'best practices' are, and second, to implement them on a nationally uniform basis.* The fact that any particular state has not adopted for its own institutions what the Board deems to be a 'best practice' cannot limit the Board's authority without undermining this fundamental purpose of the statute." (377 F.Supp. 17-18; emphasis added.)

In *Kaski v. First Fed. S & L Ass'n of Madison, 72 Wis.2d 132,* 240 N.W.2d 367 (Wis. 1976), the named plaintiffs had brought a purported class action against a federally chartered savings and loan association predicated upon the contention that a provision in the mortgage loan contracts between the association and its borrowers under which the association was authorized to increase the interest rate on the loans was invalid under state law. The trial judge had ruled that the clause in question was proper under state law. On appeal, however, the Wisconsin Supreme Court reversed, holding that federal law had preempted regulation of the investment and lending practices of federally chartered savings and loan associations, and Wisconsin State law was therefore inapplicable:

"... it is apparent that Congress has substantially occupied the field in regard to the regulation of federal savings and loan associations, particularly in the area of the regulation of lending practices. This scheme of federal regulation is pervasive. Moreover, it has long been held that the establishment of a federal system of banking or of lending is of such importance in our national life that, for the most

part, state laws should not be allowed to interfere. *McCulloch v. Maryland* (1819), 17 U.S. (4 Wheaton) 316, 4 L.Ed. 579. It is apparent that the Congress considered that the regulation of lending procedures of federal institutions was one that required national and uniform regulation." (240 N.W.2d 372)

Most recently, in *First Fed. S. & L., Boston v. Greenwald,* 591 F.2d 417, 425 (1st Cir. 1979), all of the federal savings and loan associations in Massachusetts sought a judicial declaration that they were not subject to a Massachusetts statute requiring, *inter alia,* the payment of interest on escrowed funds. The United States District Court for Massachusetts granted a summary judgment holding that federal law preempted the Massachusetts statute and the United States Court of Appeals for the First Circuit affirmed, explaining:

"The Home Owners' Loan Act grants to the Bank Board broad regulatory authority over the operation of federal savings and loan associations. ... Pursuant to this authority, the Bank Board has issued detailed regulations governing the 'operations of every Federal savings and loan association from its cradle to its corporate grave.' [Citations.] One such regulation is 12 C.F.R. § 545.6-11(c), which specifies the conditions under which the federal associations must pay interest on escrow accounts." (591 F.2d 425.)

Do any of the cases cited by the Secretary ("Jurisdictional Statement", p. 30, footnote 21) support the conclusion that HOLA and the regulations promulgated thereunder do not preempt the mortgage lending practices of federal associations when, as here, the Board has promulgated a specific regulation on point? Clearly they do not.

1. *Federal National Mortgage Ass'n v. Lefkowitz,* 390 F.2d 1364, 1368-1370 (S.D.N.Y. 1975) *did* find a state statute applicable; but it found the statute applicable not to a *federal savings*

and loan association but, rather, to another type of federally chartered institution, the Federal National Mortgage Association; and whereas HOLA invests the Board with plenary authority over federal associations (12 U.S.C. §1464(a)), no federal agency or official is vested with comparable authority over the Federal National Mortgage Association (see 12 U.S.C. § 1723a(h))).[19]

2. *Beverly Hills Fed. S. & L. Ass'n v. Federal Home L Bk. Bd.*, 371 F.Supp. 306, 313 (C.D. Cal. 1973), explicitly recognized "the exclusivity of federal regulation over federally chartered savings and loan associations" and held only that federal law "does not preclude the federal regulatory agency itself [the Board] from adopting or imposing standards derived from state or general common law principles to effectuate policies implicit in" HOLA. In the instant case, of course, not only has the Board failed to impose state "fair lending" laws, it has explicitly stated that federal associations were to be governed by the Board's own "fair lending" regulations exclusively.

[19] The Secretary's attempt to imply the contrary notwithstanding, federal law does not preempt regulation of other federally chartered financial institutions, such as national banking associations, nearly as comprehensively as it preempts regulation of federal savings and loan associations. As explained in the seminal decision of *People, etc. v. Coast Federal Sav. & Loan Ass'n*, 98 F.Supp. 311 (S.D. Cal. 1951), itself quoting an earlier decision:

> "'. . . a building and loan association organized under the Home Owners' Loan Act is not a national bank and the powers and duties of the two materially differ.' *As to national banks, Congress expressly left open a field for state regulation and the application of state laws; but as to federal savings and loan associations, Congress made plenary, preemptive delegation to the Board to organize, incorporate, supervise and regulate, leaving no field for state supervision.*" (98 F.Supp. 319; emphasis added.)

See also:

North Arlington Nat. Bank v. Kearney Fed. Sav. & L. Ass'n., 187 F.2d 564, 567 (3rd Cir. 1951), *cert. den.*, 342 U.S. 816 (1951));

Lyons Savings & Loan Ass'n. v. Federal Home Loan Bank Bd., 377 F.Supp. 11, 20-21 (N.D. Ill. 1974).

3. *Durnin v. Allentown Federal Savings and Loan Ass'n.*, 218 F.Supp. 716, 720-21 (E.D.Pa. 1963), merely held that in the *absence* of a Board regulation on the point, "the general 'common law' right of a member of a corporation to inspect and copy the membership list" (218 F.Supp. 719) would obtain. In the instant case, of course, there *are* specific regulations on point. Furthermore, in a later case, *Murphy v. Colonial Savings and Loan Association*, 388 F.2d 609, 611 (2nd Cir. 1967), the United States Court of Appeals for the Second Circuit refused to follow *Durnin*, holding that "[s]uch an issue [whether there is a right of access to the membership list of a federal association], which requires a fleshing out of the Board's regulations, is one of federal law." (388 F.2d 611).

4. *Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n*, 9 Cal.3d 731 (1973), did not even consider the question of federal preemption and hence can hardly be regarded as a case which, to use the Secretary's terminology, "found no preemption".[20]

5. *Larwood Co. v. San Diego Fed. S. & L. Ass'n.*, 185 Cal.App.2d 450, 454-455 (1960), dealt not with the question of whether federal law *preempted* the application of state law but, rather, whether state courts have *jurisdiction* over federal associations. (Neither the Board nor the Secretary take the position that state courts lack jurisdiction over federal associations; and obviously any contention that they do would be untenable.)

6. *Pearson v. First Federal Savings and Loan Ass'n.*, 149 So.2d 891, 895-86 (Fla. App. 1963), like *Durnin*, merely held that since there were no Board regulations on point, "this subject [the validity of voting proxies] was left to the prevailing law in the various state jurisdictions . . ." Again, in this case there *are* Board regulations on point; and, furthermore, the holding in *Pearson* is contrary to *Murphy v. Colonial Federal Savings and Loan Association, supra.*

[20] Under California law, a decision does not constitute precedential authority on points not expressly considered in the opinion. See, e.g., *Worthley* v. *Worthley*, 44 Cal.2d 465, 471-472 (1955).

7. *First Federal Savings & L. Ass'n v. Norwood Realty Co.*, 212 Ga. 524, 93 S.E.2d 763 (1956) *did* hold that a federal savings and loan association was subject to a state usury statute; but it did so on the ground that federal law, including a provision of HOLA itself, subjected federal associations to state usury limitations.[21] Here no such federal statute exists. (See §IV B.2., *Infra.*)

8. *Derenco, Inc. v. Benj. Franklin Fed. Sav. and Loan Ass'n*, 281 Or. 533, 577 P.2d 477 (1978), *cert. den.*, 439 U.S. 1051 (1978), held only that federal law did not preempt state laws concerning the payment of interest on escrowed funds *prior to the promulgation by the Board* of a specific regulation on point. Here, of course, there *are* specific Board regulations dealing with the "fair lending" practices of federal associations, and, again, the Board has expressly stated that they are to be exclusive. Moreover, the Secretary's citation is misleading because *Derenco* recognized that once the Board did promulgate a regulation pursuant to HOLA, it preempted state law. (577 P.2d 495-496).

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[21] In particular, the Court reasoned that under 12 U.S.C. § 1464(f) "[a] federal savings and loan association, upon its incorporation automatically becomes a member of the Federal Home Loan Bank of the district in which it is located"; and under 12 U.S.C. § 1425 "[n]o federal savings and loan association shall be retained in such membership if the combined total of the amounts paid to it for interest, commission, bonus, discount, premium, and other similar charges, less a proper deduction for all dividends, refunds, and cash credits of all kinds, creates an actual net cost to the home owner in excess of the maximum legal rate of interest or in case there is a lawful contract rate of interest applicable to such transactions, in excess of such rate (regardless of any exemption from usury laws), or, in case there is no legal rate of interest or lawful contract rate of interest applicable to such transactions, in excess of 8% per annum in the state where such property is located." (93 S.E.2d 767-768.)

In short, while there is an overwhelming body of case authority that HOLA and the regulations promulgated thereunder preempt the application of state law to the mortgage lending practices of federal associations, at least when there is a specific regulation on point, *the Secretary is unable to cite a single case from any state or federal jurisdiction which holds to the contrary.*

Since HOLA and the regulations promulgated thereunder preempt state laws concerning the mortgage lending practices of federal associations when the Board has promulgated a specific regulation on point, and since the "fair lending" practices of federal associations are an aspect of the mortgage lending practices of federal associations with respect to which the Board *has* promulgated regulations, it is obvious that HOLA and the regulation promulgated thereunder would preempt the state "fair lending" law unless the plenary delegation of authority to the Board over federal associations has been subsequently abridged by some other federal statute. As the federal associations shall demonstrate in §IV B.2., *infra,* no such abridgment exists.

2. The Contention That Federal Legislation Authorizes The State To Regulate The "Fair Lending" Practices Of Federal Associations Is Patently Spurious.

a. *The Effect Of The Equal Credit Opportunity Act*

A principal — and probably *the* principal — argument advanced by the Secretary in his attack upon the judgment of the Court of Appeals is that the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691 *et seq.*, subjects federally chartered savings and loan associations to the state "fair lending" law. What he appears to be saying, in essence, is that a provision of the Act, 15 U.S.C. §1691d(f), which states, in pertinent part, that

"[t]his subchapter [ECOA] does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter, from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter . . .", was intended to subject federal association to the application of certain state consumer protection laws, including the state "fair lending" law. ("Jurisdictional Statement", pp. 16-20.)

Let's consider the argument.

First of all, the basic criterion for determining legislative intent is the language of the statute. *Department & Specialty Store Emp. Union v. Brown,* 284 F.2d 619, 627 (9th Cir. 1961); *Future Farmers of America v. Romack,* 114 F.Supp. 796, 800 (E.D. Ill. 1953), *aff'd.* 211 F.2d 925 (7th Cir. 1954).

Here the language of 15 U.S.C. §1691d(f) does not, as the Secretary seems to assume, purport to apply to federal associations (or anyone else, for that matter) state laws that would not otherwise be applicable to them. Rather, it simply negates an implied preemption that might otherwise arise from the enactment of the ECOA by providing that the ECOA *itself* "does not annul, alter, or affect, or exempt [anyone from complying with]", state law (except to the extent that state and federal law are inconsistent).[22]

The Secretary's characterization of the legislative history of ECOA as manifesting a legislative intent that the states should be permitted to legislate on the subject of "fair lending" is misleading. While it may be true that Congress did not by enacting ECOA intend to *deprive* states of the power to legislate with respect to the subject of "fair lending", *nothing in the legislative history cited by the Secretary could reasonably be read to suggest that ECOA was intended to create a power to legislate which could not otherwise exist.*

[22] The federal associations, of course, do not take the position that state law is inapplicable to them because of ECOA.

Moreover, statutes which contain similar language and are designed to serve a purpose should be interpreted *pari passu. Northcross v. Board of Ed. of Memphis City Schools,* 412 U.S. 427, 428 (1973). Hence, assuming *arguendo* and contrary to fact that §1691d(f) was ambiguous in respects here material, obviously the judicial interpretation, and legislative history, of statutes which are cognates of §1691d(f) would be relevant to its interpretation. Yet an examination of the judicial interpretation which has been accorded to, and the legislative history of, such cognates clearly reinforces the conclusion that the only purpose of §1691d(f) was to negate an inference of implied preemption.

The provision is apparently modeled after, *inter alia,* a subsection of the Truth-In-Lending Act, 15 U.S.C. §1610(a):

> "This subchapter does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter or regulations thereunder, and then only to the extent of the inconsistency."

An examination of the legislative history of §1610(a) clearly demonstrates that its sole purpose was to negate the inference that the *Truth-In-Lending Act* itself was intended to impliedly preempt state laws in the specified fields — not to render applicable state laws which would otherwise be inapplicable because *other federal laws* have preempted the field. As a report of the Senate Committee on Banking and Currency explained:

> "Section 6(a) [15 U.S.C. §1610(a)] would establish the basic congressional policy that *the bill* does not preempt State consumer credit legislation unless the State provision was inconsistent with the Federal law, and then only to the extent of the inconsistency. This section [15 U.S.C. §1610(a)] sets forth the basic policy that *the Federal statute* [the Truth-In-Lending Act] does not preempt State legislation.

"The original version of S. 5 [the bill containing the Truth-In-Lending Act] said *the act* did not annul State law unless the law was 'directly inconsistent'. The committee bill drops the word 'directly' and adds the further stipulation that inconsistent State laws are annulled 'only to the extent of the inconsistency'. The word 'directly' was dropped because there is no apparent difference between inconsistent or directly inconsistent. The added phrase makes clear that *S. 5* does not preempt an entire body of State law should an inconsistency arise in one case." (S. Rep. No. 392, 90th Cong. 1st Session (1967); emphasis added.)

Another provision which is also modeled after §1610(a) and which is therefore also a cognate of §1691d(f) is a provision of the Real Estate Settlement Procedures Act, 12 U.S.C. §2616 which provides, in pertinent part:

"This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency."

The stated purpose of the provision, which was introduced into the legislation through a House of Representatives amendment (*see* S. Rep. No. 866, 93rd Cong., 2d Session (1974); H.R. Rep. No. 1177, 93rd Cong., 2d Session (1974)), was, as explained by author of the amendment, Representative Sullivan, merely to avoid any inference that the Act was intended to preempt state law:

"[T]he question may be raised that we *could be preempting* the rights of the states. . . . I think it should be made clear that no preemption of State or local government authority . . . is intended *by this legislation . . . my purpose* in offering this amendment *is to put to rest any*

lingering *doubt* as to *whether the bill we are considering today preempts* the rights of State and local governments." (120 Cong. Rec. 28281 (1974); emphasis added.)

Finally, in *First Federal S. & A., Boston, v. Greenwald,* 591 F.2d 417 (1st Cir. 1979), in which the State of California itself was an *amicus curiae,* the United States Court of Appeals for the First Circuit was presented with the same argument concerning the effect of §2616 upon the subject of "escrow funds" that the Secretary is presenting here concerning the effect of §1691d(f) upon "fair lending" practice: that the provision subjects federal associations to the application of state law in the area. The Court of Appeals for the First Circuit, however, flatly rejected the argument, explaining:

"The Commissioner argues that RESPA §18, 12 U.S.C. §2616, undermines the preemptive effect of 12 C.F.R. §545.6-11(c). The argument is that §2616 affirmatively 'permits the operation of state laws regulating settlement practices except as they are inconsistent with RESPA,' that the payment of interest on escrow accounts is a 'settlement practice,' and that therefore §2616 affirmatively permits state statutes such as Mass. G.L.c.183, §61. Since a federal statute affirmatively permits the Massachusetts interest requirements, the argument goes, a Bank Board regulation cannot invalidate the state law.

"The Commissioner reads §2616 far too broadly. On its face §2616 only states that '*This chapter* does not annul, alter, or affect, or exept any person [from] the laws of any State with respect to settlement practices. . . .' [Emphasis added]. Thus, §2616 relates solely to the preemptive effect of 12 U.S.C. ch. 27, which consists only of RESPA. Section 2616's scope does not extend to 12 C.F.R. §545.6-11(c), as it was promulgated by the Bank Board pursuant to the Home Owners' Loan Act, 12 U.S.C. §1464(a), and not pursuant to RESPA." (591 F.2d 426.)

In summary, the Secretary is, in effect, attempting to take a "shield" provided by ECOA to preclude the contention that *it* displaces state law and to use that "shield" as a "sword" to impose state law where it would not otherwise be applicable. He may not do so.

b. *The Effect of Title VIII*

While the Secretary's argument that federal law explicitly subjects the "fair lending" practices of federal associations to state law rests principally upon ECOA, he also relies upon a provision of the Civil Rights Act of 1968, 42 U.S.C. §3615 [erroneously referred to in the "Jurisdictional Statement" as §3616], which provides that "nothing in the Act [the Civil Rights Act of 1968] should be construed to invalidate or limit any law of a state or political subdivision of a state, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter". ("Jurisdictional Statement", p. 20.) Again it is obvious that, as with the corresponding provision of ECOA, the function of the statute is merely to negate an inference that the Act in which it is contained impliedly preempts state law — not to impose state laws which would otherwise be inapplicable.

3. **The Home Mortgage Disclosure Act Preempts The State "Fair Lending" Law Insofar As It Deals With The Maintenance And Public Disclosure By Federal Associations Of Records Concerning The Geographical Distribution Of Loans.**

A federal statute, The Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. §2801 *et seq.*, preempts the state "fair lending" law insofar as it deals with the maintenance and public disclosure by all federally chartered financial institutions of information concerning the geographical distribution of loans. *National State Bank, Elizabeth, N.J. v. Long,* 469 F.Supp. 1068, 1073-1074 (D.N.J. 1979). Indeed, the Secretary himself comes close to so conceding. (See "Jurisdictional Statement", p. 21.)

As set forth in §IV B.1. and 2., *supra,* the judgment of the Court of Appeals that HOLA and the regulations of the Board promulgated thereunder preclude the Secretary from imposing upon federal associations the procedural requirements of the state "fair lending" law is correct. Even assuming, *arguendo,* however, that the Court of Appeals erred in its interpretation and application of HOLA, the judgment would still be correct in its result and therefore properly affirmable to the extent that the Secretary was attempting to compel federal associations to comply with provisions of the state "fair lending" law dealing with the maintenance and disclosure by the federal associations of information dealing with the geographical distribution of loans.

C. ***The Interjection Into The Within Appeal By Amici Curiae Of The Assertion That The Federal Savings and Loan System Itself Is Unconstitutional Makes A Summary Disposition Of The Appeal Particularly Urgent.***

The attorneys general of twenty eight states (or territories), acting as *amici curiae,* have asserted in their brief in the within appeal that the federal savings and loan system is unconstitutional. ("BRIEF OF AMICI CURIAE" pp. 8-9.) The assertion is, of course, preposterous (see, e.g., *Fahey v. Mallonee,* 332 U.S. 245 (1947)); but the very existence of the assertion threatens the well-being of the federal savings and loan system and makes a summary disposition of the appeal imperative. (For a discussion of the possible impact of the assertion upon federal associations and therefore upon the availability of mortgage credit, see "BRIEF OF THE AMERICAN SAVINGS AND LOAN LEAGUE AS AMICUS CURIAE IN SUPPORT OF MOTIONS OF APPELLEES TO DISMISS OR AFFIRM", pp. 7-9).[23]

[23] Why some of the attorneys general have even elected to participate as *amici curiae* in the within appeal is inexplicable, since approximately forty percent of them represent states that do not even have state "fair lending" laws.

V

CONCLUSION

The purported appeal should be dismissed on the ground that the judgment of the Court of Appeals is not appealable or, alternatively, it should be affirmed on the ground that it is manifestly correct and therefore does not present a question which is sufficiently substantial to warrant argument.

Respectfully submitted,

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